

No. A06-1193

STATE OF MINNESOTA
IN SUPREME COURT

Irongate Enterprises, Inc.,

Relator,

vs.

County of St. Louis,

Respondent.

BRIEF OF RELATOR IRONGATE ENTERPRISES, INC.

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LEGAL ISSUES

- I. Did the Tax Court err when it found that the detailed income and expense information provided by Relator, Irongate Enterprises, Inc. (“Irongate”), within 60 days after the deadline for filing its Petition, did not meet the requirements of Minn. Stat. § 278.05, subd. 6(a), commonly known as the “the 60 Day Rule?”**

The Tax Court held that Irongate’s submission of detailed income and expense statements, together with rent rolls detailing the income and expense information contained in the leases, did not satisfy the requirement that it produce “income and expense figures” and “anticipated income and expenses” as required by the 60 Day Rule.

Most apposite cases and statute:

BFW Co. v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997)

Mendota Mall Assoc. v. County of Dakota, 578 N.W.2d 350 (Minn. 1998)

Kmart Corp. v. County of Becker, 639 N.W.2d 856 (Minn. 2002)

Kmart Corp. v. County of Douglas, 639 N.W.2d 863 (Minn. 2002)

Kmart Corp. v. County of St. Louis, 639 N.W.2d 866 (Minn. 2002)

Minn. Stat. § 278.05, subd. 6(a)

- II. Did the Tax Court err when it found that leases must be produced in order to comply with the 60 Day Rule, where the statute requires “information, including income and expense figures, verified net rentable area, and anticipated income and expenses,” and makes no mention of leases or any other documents containing the requisite information?**

The Tax Court ruled that the 60 Day Rule required production of all leases, interpreting the statute to require not only income and expense information, but also “production of any and all information available to a petitioner,” including any information a County might years later contend would be “useful to the appraiser’s analysis,” or “relevant to the appraisal process.”

Most apposite cases and statute:

Charles W. Sexton Co. v. Hatfield, 116 N.W.2d 574, 580 (Minn. 1962)

BFW Co. v. County of Ramsey, 556 N.W.2d 702 (Minn. 1997)

Minn. Stat. § 278.05, subd. 6(a)

III. By holding that it requires “production of any and all information available to a petitioner seeking to reduced the assessed value of its property” as well as production of any and all information “useful” to the appraiser or “relevant to the appraisal process,” did the Tax Court err by interpreting the 60 Day Rule in a manner that rendered the statute unconstitutionally vague?

The Tax Court interpreted the 60 Day Rule to require a litigant appealing its real property taxes associated with income producing property to produce any and all information “useful to the appraiser’s analysis” or “available . . . in its possession related to the income-producing property that would be relevant to the appraisal process,” where relevance is determined subjectively, after the fact, by the taxpayer’s adversary, leaving the taxpayer no way to ascertain what information must be produced within the statutorily prescribed compliance period.

Most apposite cases and statute:

State v. Orsello, 554 N.W.2d 70 (Minn. 1996)

Kmart Corporation v. County of Stearns, 710 N.W.2d 761 (Minn. 2006)

Minn. Stat. § 278.05, subd. 6(a)

IV. Did the Tax Court err in finding that Irongate refused to produce leases relating to the subject property in discovery, when (1) no discovery motion was ever brought by the Respondent, “St. Louis County,” (2) Irongate did not refuse to produce the leases, but tendered production of actual leases where maintained in the ordinary course of business in accordance with previous Tax Court discovery rulings, and (3) dismissal would not have been a proper sanction if St. Louis County had actually brought a motion to compel under Minnesota Rule of Civil Procedure 37?

The Tax Court found that, by tendering copies of leases for review and copying where maintained in the ordinary course of business, Irongate failed to produce its leases in connection with discovery, and that the alleged discovery failure violated the requirements of the 60 Day Rule and justified dismissal of Irongate's petition.

Most apposite case and Rule:

Corporate Property Investors v. County of Ramsey, File Nos. C3-03-7861 *et al.* (Minn. Tax Ct. April 23, 1996)
Minn. R. Civ. P. 37.01

STATEMENT OF THE CASE

Fundamental notions of statutory construction, equity and fairness require reversal in this case. Irongate complied with the plain meaning of language of the 60 Day Rule. Irongate's interpretation was supported by a long line of Minnesota Supreme Court and Minnesota Tax Court decisions, guiding its timely provision of full and complete income and expense information in this case. Neither the literal language of the Rule, nor any prior decisions, indicated that in addition to the income and expense information that was provided, a full copy of each and every one of Irongate's leases in place at some undetermined point in time also must be produced in order to satisfy the 60 Day Rule. St. Louis County had not previously complained to Irongate that its 60 Day Rule submissions were inadequate in any respect.

Rather, several months after the deadline to comply with the 60 Day Rule, a discovery dispute arose. Irongate had tendered copies of the lease documents where maintained in the ordinary course of business, and had previously furnished the income and expense information contained in the leases with its 60 day rule compliance

submittal. St. Louis County opted not to move to compel discovery under the discovery rules, but instead used the discovery dispute as a rubric for seeking dismissal under the 60 Day Rule. The Tax Court's decision granting St. Louis County's motion to dismiss not only expansively and erroneously interpreted the law, but also improperly applied to a simple discovery dispute the draconian sanction of dismissal. The Tax Court's decision was improper and should be reversed by this Court.

STATEMENT OF THE FACTS

Irongate filed its petition on January 8, 2005, contesting the property taxes payable in 2005 on the Irongate Mall, an enclosed shopping center in the City of Hibbing, St. Louis County, Minnesota. (RA-4.) On June 28, 2005, within the deadline to submit information under the 60 Day Rule, Irongate provided the St. Louis County Assessor with detailed income and expense statements for 2003, 2004 and year-to date-2005, and detailed rent rolls containing the income and expense information from the leases in place as of January 31, 2004, December 22, 2004 and May 23, 2005. (RA-40.)

The income and expense statements clearly and specifically identified all income received by Irongate, including but not limited to base rent, overage rent and escalator clause rent from all tenants, all tenant reimbursement information (including but not limited to reimbursements for common area maintenance, property insurance, dues and real estate taxes) and a detailed accounting of all real estate related expenses. (RA-68-73.) Further, the rent rolls identified each tenant by name, location within the mall, square footage of space rented, and contained all income and expense information in the leases such as market and actual rent, deposits, move-in dates and lease duration. (RA-

74-76.) At no time after June 28, 2005, until the filing of its 60 Day Rule Motion nearly six months later, did St. Louis County indicate that it believed Irongate's 60 Day Rule submissions were deficient in any respect.

After June 28, 2005, the case proceeded typically through the litigation process until on August 17, 2005, St. Louis County served Irongate with Interrogatories and Requests for Production of Documents, including a request that Irongate produce a copy of all leases of space within the mall from January 1, 2000, through the present. (RA-13.) Irongate timely provided St. Louis County Answers and Responses, which stated that the requested leases would be made available for review and copying at Irongate's corporate headquarters in New York, where the leases are kept in the usual course of business. (RA-23.) Thus, Irongate did not refuse to produce the leases, but rather, based upon existing Tax Court discovery rulings, objected only to producing them in a distant location. Irongate did furnish with its discovery lease abstracts (or summaries) for each tenant which were used in the ordinary course of business and less burdensome to copy and produce. (RA-41.)

After receipt of Irongate's Answers and Responses, St. Louis County did not initiate a conference to work out the discovery dispute without court action as required by Minn. R. Civ. P. 37.01(b). Nor did the County file a motion seeking to compel Irongate to physically produce the leases in question in Minnesota. Instead, on December 16, 2006, St. Louis County served and filed its motion to dismiss Irongate's petition on the ground that Irongate failed to produce its leases within the 60 Day Rule compliance period. (RA-26.) In its submissions in support of its motion, St. Louis

County detailed the discovery that it had requested and what Irongate had and had not produced, implying those facts were somehow relevant to whether Irongate's petition should be dismissed under the 60 Day Rule. (RA-27-28.)

Irongate opposed St. Louis County's motion, arguing it had fully complied with the 60 Day Rule. Irongate further argued that what Irongate had (or had not) produced in discovery was wholly irrelevant to any analysis of the 60 Day Rule. (RA-45-63.) The Minnesota Tax Court issued a decision on April 28, 2006, dismissing Irongate's petition for failure to also produce the leases in question in connection with the 60 Day Rule. (RA-92.) In its decision, the Tax Court held that the 60 Day Rule requires "production of any and all information available to a petitioner seeking to reduce the assessed value of its property." (RA-97.)

In accordance with Minnesota Rule of General Practice 115.11, on May 15, 2006, Irongate's counsel wrote to the Minnesota Tax Court to request permission to bring a motion for reconsideration of its Order. Irongate specifically advised the Court that it intended to argue that the Court's interpretation of the 60 Day Rule was erroneous and that it rendered the 60 Day Rule unconstitutionally vague. (RA-98-99.) The Minnesota Tax Court granted Irongate's request to bring a motion for reconsideration. In its motion for reconsideration, Irongate argued that the Minnesota Tax Court had misinterpreted the 60 Day Rule, and that its interpretation of the 60 Day Rule rendered the rule unconstitutionally vague. (RA-101-103.)

By Order dated August 25, 2006, the Minnesota Tax Court denied Irongate's motion for reconsideration, holding that the 60 Day Rule requires a taxpayer to produce

all information that is “useful to the appraiser’s analysis” or “relevant to the appraisal process.” (RA-151.) In the instant case, notwithstanding that Irongate had provided income and expense statements and rent rolls that collectively contained all of the income and expense information found in the leases, the Tax Court determined the leases were useful and/or relevant and therefore, should have been produced. (RA-151.)

STANDARD OF REVIEW

This case presents two over-arching questions for this Court: (1) did the Minnesota Tax Court erroneously interpret Minn. Stat. § 278.05, subd. 6(a); and (2) did the Minnesota Tax Court’s interpretation of Minn. Stat. § 278.05, subd. 6(a) render the statute unconstitutionally vague. It is well settled that issues of statutory construction are questions of law and are subject to *de novo* review. See e.g., In re Estate of Jotham, 722 N.W.2d 447, 450 (Minn. 2006). The same *de novo* standard applies when evaluating a constitutional challenge to a statute, because that also raises a question of law. See In re Blilie, 494 N.W.2d 877, 881 (Minn. 1993); Doll v. Barnell, 693 N.W.2d 455, 460 (Minn. Ct. App. 2005). Therefore, the issues in this case are entitled to *de novo* review.

ARGUMENT

I. IRONGATE PRODUCED ALL REQUISITE INCOME AND EXPENSE INFORMATION WITHIN THE TIME FRAME REQUIRED BY THE 60 DAY RULE.

A. The 60 Day Rule Requires Production of Information, Including Income and Expense Figures, Verified Net Rentable Areas, and Anticipated Income and Expenses.

The 60 Day Rule requires a property owner appealing the assessment of an income-producing property to provide the county assessor with “information, including

income and expense figures, verified net rentable area, and anticipated income and expenses. . . .” no later than 60 days after the deadline for filing its tax court petition.

Minn. Stat. § 278.05, subd. 6(a). The dispute in this case relates to the portion of the rule addressing “income and expense figures” and “anticipated income and expenses.” The 60 Day Rule does not require the production of each and every *document* containing income and expense information (such as a lease); only that income and expense *information* be provided. Irongate timely complied with these production requirements of the 60 Day Rule.

B. Irongate Produced All Required Information Including Income and Expense Figures and Anticipated Income and Expenses Through the Production of its Income and Expense Statements and Rent Rolls.

The Minnesota Tax Court correctly found that Irongate timely produced its income statements for 2003, 2004 and year-to-date 2005 and its rent rolls containing detailed income and expense information for January 31, 2004, December 22, 2004 and May 23, 2005. This finding, however, is contradicted by the Court’s subsequent finding that Irongate failed to provide the required income and expense information, because it did not produce the lease documents themselves. These two findings are inconsistent, because the income or expense information contained in the leases is *also* contained in the income statements and/or the rent rolls that Irongate timely produced. Thus, Irongate did produce the requisite income and expense information contained in the leases. It just did not produce every document in which the information could be found.

Specifically, all of Irongate’s sources of real estate-related income were broken out on its income statements for the subject property, including: base rent, overage rent,

rent recaptured, NSF fees, other income, common area maintenance reimbursement, property insurance reimbursement, merchant dues, property tax reimbursement, and miscellaneous. (RA-68-73.) Irongate had no other income to identify or report. Production of the actual leases would merely be redundant of the income information unquestionably provided.

Likewise, Irongate's income statements included full and complete details regarding all of the subject property's real estate-related expenses, including: real estate taxes, administrative expenses (including, but not limited to, items such as licenses and permits, management fees and property insurance), utilities, payroll, repairs and maintenance, leasing commissions, exterior maintenance, interior maintenance, general building expenses, and other office area expenses. (RA-68-73.) Again, Irongate had no other expenses to identify or report. Production of the actual leases themselves would be merely redundant of the expense information unquestionably provided.

The rent rolls which Irongate also provided contained the only other income and expense information found in the leases that is not otherwise contained in the income statements. This additional information from the rent rolls includes items such as the names and number of tenants, the location of rented space, the size of rented space and the specific rent paid by each tenant. The Minnesota Tax Court has held that production of such additional information is required under the 60-Day Rule. See Outboard Services Co. v. County of Cass, File No. C6-04-486 (Minn. Tax Ct. Feb. 2, 2005). In the present case, all of this information is clearly identified on the rent rolls that Irongate timely

produced. (RA-75-76.) Thus, once again, production of the actual leases themselves would have been merely redundant information.

Nowhere does the language of the statute require the production of all documents containing income and expense information in multiple redundant forms. Nowhere does the statute mention leases. The Court's conclusion that Irongate was statutorily required produced the leases in question, notwithstanding that it produced all income and expense information contained within those leases, inconsistent with the literal language of Minn. Stat. § 278.05, subd. 6(a).

Moreover, it fails to comport with the very purpose of and reason for Chapter 278. The general purpose of Chapter 278 is to provide

an adequate, speedy, and simple remedy for any taxpayer to have the validity of his claim, defense, or objections determined by the . . . court in matters where the taxpayer claims that his real estate has been partially, unfairly, or unequally assessed . . .

BFW Co. v. County of Ramsey, 566 N.W.2d 702, 705 (Minn. 1997). To go beyond the limited statutory requirement that income and expense information be provided, and to further require that the same income and expense information must be produced in duplicative documents, for no purpose which can be traced to the wording of the statute, serves only to effectively hinder the “adequate, speedy, and simple remedy for [a] taxpayer to have the validity of his claim, defense, or objections determined by the . . . court . . .” Id.

C. **BFW Did Not Hold That the 60 Day Rule Requires Production of All Information That An Assessor Might One Day, Long After-the-Fact, Contend is Useful or Relevant to Valuation, Regardless of Whether that Information Falls Within One of the Three Statutory Described Categories Listed in the 60 Day Rule.**

The Tax Court concluded that leases were required pursuant to the 60 Day Rule “in the instant case,” not because any income or expense information was missing from Irongate’s timely 60 Day Rule production, but instead because the leases contain additional information that the County claimed would be “useful to the appraiser’s analysis.” (RA-151.) In reaching its conclusion, the Tax Court relied upon the decision in BFW v. County of Ramsey, 566 N.W.2d 702 (Minn. 1997). The Tax Court concluded that under BFW the information that must be produced is nothing short of any and all information that is useful to the appraiser’s analysis or “relevant to the appraisal process.” The Minnesota Tax Court misinterpreted the Supreme Court’s holding in BFW.

Like the Irongate Mall, the subject property in BFW was a shopping center. In BFW, the Court considered the scope of the unavailability exception within the statute, which it described as a “question of statutory interpretation.” BFW, 566 N.W.2d at 703. The taxpayer in BFW, who owned and operated the shopping center, maintained unaudited income and expense statements for the property, but did not produce *any* income and expense information within the 60-day period, arguing that its unaudited statements were unreliable and inaccurate and its audited reports were not yet available. Therefore, the taxpayer argued that its failure to produce the information should be excused under the statute, because “it was due to the unavailability of the evidence at that time.” Id. at 704.

BFW interpreted only the “unavailability” clause of the 60-Day Rule, and held that under the plain meaning of the statute, “unavailable” did not mean “unreliable” or “inaccurate.” Id. at 705. The BFW court’s statutory interpretation did not, however, extend to defining the scope of what income and expense information the statute required to be produced. The Court simply stated that BFW, the shopping center owner and landlord, must provide “income and expense *figures* within its possession on the date of the deadline, along with the other *information* required by the statute,” to the assessor within the 60 days. Id. at 706. (*emphasis added*) Thus, even though the taxpayer in BFW rented its property out to various tenants who operated retail businesses in its shopping center, neither the parties, the Tax Court, nor the Supreme Court suggested in the slightest manner that production of actual leases would be necessary in order to comply with the 60-Day Rule.

Though resting its decision in BFW on a “plain meaning” analysis, the Court went on to consider whether its interpretation of the unavailability clause served the Legislature’s purpose in enacting the statute. It observed that the general purpose of Chapter 278

was to provide “an adequate, speedy, and simple remedy for any taxpayer to have the validity of his claim, defense, or objections determined by the * * * court in matters where the taxpayer claims that his real estate has been partially, unfairly, or unequally assessed * * *.”

BFW, 566 N.W.2d at 705 (citations omitted). It concluded that “[s]trict enforcement of the 60-day rule is consistent with this purpose, except when the *required information* is simply not available to a petitioner.” Id. (Emphasis added.)

St. Louis County relied solely upon the above-quoted passage to support its contention that strict enforcement of the 60 Day Rule in this case required the production of the actual leases. However, strict enforcement of the statute does not permit a court to rewrite or expand the scope of the statute; indeed, strict enforcement precludes rewriting or expanding the Legislature's enacted words and phrases. Strict enforcement presumes interpretation of the statute consistent with the intent of the Minnesota Legislature and accepted rules of construction. Under Minnesota law relating to statutory interpretation, "the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16. Here, the goal of providing an "adequate, speedy, and simple remedy for any taxpayer" is not be served by an interpretation that effectively denies the taxpayer any right to present its case on the merits for failure to comply with requirements not identifiable in the plain language of the statute itself, but were instead claimed, after the fact, to be useful or relevant to the assessor.¹

Ultimately, the distinction between BFW and this case is decisive; contrary to the dispute in this case, neither side in BFW disputed whether the income and expense statements there in question fell within the scope of the 60 Day Rule. In BFW, the shopping center owner provided no 60 Day Rule compliance information at all. Thus, the only issue in BFW was whether that the alleged unreliability of unaudited statements (since income and expense statements were admittedly required) rendered income and expense statements effectively unavailable until audited statements were "available,"

¹ The Tax Court's interpretation also conflicts with the Legislature's indication in Minn. Stat. § 13.51, subd. 2 that "lease information" is not included in the phrase "income and expense figures." See discussion at pp. 15-16, infra.

bringing them within the statutory exception to the production requirement. The Court concluded that the unaudited income and expense figures within the taxpayer's possession must be produced, regardless of their accuracy or reliability. BFW, 566 N.W.2d at 705.

That conclusion was reached, however, in the context of the parties' implicit agreement that the particular category of information under consideration – the owner and landlord's income and expense statements for the subject property – fell within the 60 Day Rule's ambit. The decision in BFW did not reach beyond those three explicit categories of information identified in the 60 Day Rule. Nothing in BFW requires a court or taxpayer to consider other categories of information. Nothing in BFW expands the statute to include any and all *documents*, such as leases, instead of income and expense "*information*" as the Legislature prescribed. Ultimately, neither Ramsey County, the Tax Court, nor the Supreme Court in any manner intimated that BFW, as owner and landlord of the shopping center, was required to furnish the actual leases of the shopping center in connection with the 60 Day Rule.

II. THE 60 DAY RULE DOES NOT REQUIRE A TAXPAYER TO PRODUCE COPIES OF LEASES.

A. The Plain Language of the 60 Day Rule Does Not Require the Production of Leases.

Minn. Stat. § 278.05, subd. 6(a) provides in pertinent part:

“[i]nformation, including income and expense figures, verified net rentable areas, and anticipated income and expenses, for income-producing property must be provided to the county assessor no later than 60 days after the applicable filing deadline contained in section 278.01, subdivision 1 or 4.

The statute describes the required information as consisting of income and expense “figures” (i.e.: numbers). The words “lease,” lease covenants or restrictions, and/or the more generic “lease information” do not appear anywhere in the 60 Day Rule statute. Regardless, the Minnesota Tax Court has effectively rewritten Minn. Stat. § 278.05, subd. 6(a) to add the requirement that all actual leases of tenants, as of some undetermined point in time, must also be produced.

The Minnesota Tax Court’s rewriting of the 60 Day Rule is an unjustified act of judicial activism, neither contemplated by the actual language of the 60 Day Rule statute, nor consistent with any reasonable interpretation of the statute’s informational categories. Indeed, the Legislature used these very same terms and phrases in the identification of “income property assessment data” under Minn. Stat. § 13.51, subd. 2 (as that statute was amended by the Legislature in 1991), an interrelated statute similarly central to property tax appeals under Minnesota Statute Chapter 278.² In 1991 a clause was added to describe lease information as a new category of income property assessment data, demonstrating that the Legislature did not believe that lease information was included in the terms and phrases incorporated in the 60 Day Rule.

Prior to 1991, “income property assessment data,” which is classified as non-public or private under the Minnesota Government Data Practices Act, was defined as:

- (a) detailed *income and expense figures*;
- (b) average vacancy factors;

² Minn. Stat. § 13.51, subd. 2 is a provision of the Minnesota Government Data Practices Act, first enacted in 1974 as the “Data Privacy Act,” which specifically defines “income property assessment data,” and classifies such data as private or non-public.

- (c) *verified net rentable areas* or net usable areas, whichever is appropriate;
- (d) *anticipated income and expenses*; and
- (e) projected vacancy factors.

Id. (Emphasis added.) This language, particularly clauses (a), (c) and (d), directly matches the descriptive language of the 60 Day Rule informational categories, which had originally been enacted by the Minnesota Legislature in 1991 as the “30 Day Rule.” Minn. Stat. § 278.05, subd. 6 (1991). In 1991, the Legislature amended Minn. Stat. § 13.51, subd. 2 to add one more category of income property assessment data: “lease information.” That amendment establishes as a matter of statutory construction that the Minnesota Legislature considered “lease information” as separate and distinct from “detailed income and expense figures,” “verified net rentable area,” and “anticipated income and expenses.” The Tax Court’s decision in this case presumes that the Legislature included “lease information” in the 60 Day Rule terms of Minn. Stat. § 278.05, subd. 6(a), but excluded “lease information” from the very same terms of Minn. Stat. § 13.51, subd. 2. Such an interpretation fails to conform to the intended meaning of the very same language as used by the Minnesota Legislature.

The only reasonable way to consistently read the two statutes together is to conclude that the Minnesota Legislature did not consider “lease information” to be included within the scope of “income and expense figures, verified net rentable area, or anticipated income and expenses.” Otherwise, its addition of “lease information” as a separate category in § 13.51, subd. 2, would have been unnecessary. If the Minnesota

Legislature had intended that “lease information” be produced as part of the 60 Day Rule, it could have expressly stated that requirement in the 60 Day Rule statute, just as it did when it added the clause “lease information” to Minn. Stat. § 13.51, subd. 2.

Any other interpretation would lead to an inconsistent and absurd result: i.e.: that the phrase “income and expense figures” has one definition in one statute, and a contrary definition in a related statute, despite the fact that the two statutes relate to the exact same information and an identical and interrelated interpretative context. This would amount to an unlawful and improper interpretation, contrary to the Minnesota Legislature’s guidance that when interpreting statutes, courts are directed to avoid an absurd result. See Minn. Stat. § 645.17 (providing that courts should presume that the Legislature does not intend a result that is “absurd, impossible of execution, or unreasonable,” and intends the entire statute to be effective and certain).

B. The Lease Information which Irongate Did Not Timely Produce Does Not Constitute Income and Expense Figures or Anticipated Income and Expenses.

The Tax Court found that the information provided by Irongate did not include “noncompete clauses, renewal options, escape clauses or exclusives, all useful to the appraiser’s analyses.” Such covenants and clauses may be found in leases. However, whether or not such information is “an important part of the appraisal process,” as the Court ruled, is not the standard which the Legislature expressed in the 60 Day Rule. Such information is not “information, including income and expense figures, verified and rentable areas, or anticipated income and expenses.” The Legislature could have provided in the 60 Day Rule that “all information useful to the appraisal process must be

provided,” but did not do so. The Legislature could have provided in the 60 Day Rule that “lease covenants and restrictions” are included in the requisite information, but did not do so. The Tax Court, therefore, grafted onto the 60 Day Rule a new and insatiable standard not intended by the Legislature.

C. Any Doubt or Ambiguity about the 60-Day Rule’s Application Should Be Resolved in Favor of the Taxpayer.

When courts interpret taxing statutes, the rules of construction require that any doubt should be resolved in the taxpayer’s favor.

“Where the meaning of its taxing statute is doubtful, the doubt must be resolved in favor of the taxpayer. [The court is] not permitted to extend the scope of a tax-levying statute beyond the clear meaning of the language used.”

Charles W. Sexton Co. v. Hatfield, 116 N.W.2d 574, 580 (Minn. 1962). Even if the meaning of this tax statute were doubtful or ambiguous, “the doubt must be resolved in favor of the taxpayer.” Northland Country Club v. Comm’r. of Taxation, 241 N.W.2d 806 (Minn. 1976). “It is a subtle rule in the construction of tax laws that, where a statute is capable of two constructions and the intent of the Legislature is in doubt, such doubt as a rule should be resolved in favor of the taxpayer.” State ex rel. Western Union Tel. Co. v. Minnesota Tax Comm., 155 N.W. 1061, 1064 (Minn. 1916).

Here, the rules of construction are patently clear. The identical terms in § 13.51, subd. 2 and in § 278.05, subd. 6(a) must be interpreted consistently. As a matter of statutory construction, the former establishes that “lease information” was not intended by the Legislature to be included in the terms “income and expense figures, verified net rentable area or anticipated income and expenses.” Even if some ambiguity were

presumed to exist, then under Minnesota law, the Tax Court should have resolved any perceived ambiguity in the 60 Day Rule in favor of Irongate. To the contrary, the Tax Court looked beyond the written letter of the 60 Day Rule and the identifiable intention of the Legislature when it rewrote the 60 Day Rule to require the production of leases, even where income and expense figures and the other described information under the requirements of the 60 Day Rule had already been produced. The Tax Court's interpretation of the statute is supported neither by the actual language enacted by the Minnesota Legislature, nor by the prior decisions of the Minnesota Supreme Court.

D. No Minnesota Case Law Supports the Minnesota Tax Court's Conclusion that Irongate Had Notice that Production of its Leases Would Be Required Pursuant to the 60 Day Rule.

The Tax Court relied upon two previous Minnesota Tax Court cases to support its conclusion that "as early as 2004, there has been no question as to whether a lease containing income and expense information should be provided under the 60-Day Rule." (RA-97.) The cases relied upon by the Tax Court are readily distinguished factually from the present case, and therefore do not support the contention that the same result should follow here.

(i) Irongate Has Complied With the Reasoning and Rulings of the Prior Cases Cited by the Minnesota Tax Court.

The first case relied upon by the Tax Court, 1100 Nicollet Mall, L.L.P. v. County of Hennepin, File No. TC-29591 (Minn. Tax. Ct. March 25, 2004), is a case where *no* actual income and expense figures were produced. In 1100 Nicollet Mall, the parties disagreed regarding what and when income and expense information was produced.

Specifically, they disagreed whether a *pro forma* statement was produced within the time limits of the 60-Day Rule. Importantly, however, both parties in 1100 Nicollet Mall agreed that no *actual* income and expense information was produced within the time limits of the 60-Day Rule. In contrast, here, Irongate did produce detailed income and expense statements and detailed rent rolls within the time limits required by the 60-Day Rule. 1100 Nicollet Mall does not stand for the proposition that timely-produced income and expense statements and detailed rent rolls fail to satisfy the 60 Day Rule unless leases are also produced resulting in multiple, redundant forms in which the same information is provided.

Moreover, the main dispute in 1100 Nicollet Mall related to a single lease between the taxpayer and a related entity. In that case, the assessor accidentally came across the lease in question while looking through a city file long after the deadline had passed under the 60-Day Rule. Prior to that point in time, the petitioner had not even disclosed the existence of the lease, let alone provided the assessor with any information about the lease. The Court determined that, under those circumstances, the petitioner should not be excused for failing to produce the lease information. Conversely, Irongate did provide the income and expense information contained in all its leases, both through the detailed information found on the rent rolls together with the inclusion of rent, overage rent and tenant reimbursement information on the income and expense statements. The 1100 Nicollet Mall case is inapposite and does not impose a blanket requirement that leases must always be produced.

The second case relied upon by the Tax Court is Outboard Services Co. v. County of Cass, File No. C6-04-486 (Minn. Tax Ct. Feb. 2, 2005). Like 1100 Nicollet Mall, the Outboard Services case involved a dispute regarding whether a single lease should have been produced. In Outboard Services, the petitioner, a boat storage facility, not only failed to produce the lease, but also failed to produce income and expense information in anything but summary form. As the Tax Court found in Outboard Services, the petitioner's 60 Day Rule submissions did not "list the names of the people with whom Petitioner did business, how many boats were stored, and who paid what amounts. . . ." Outboard Services Co. v. County of Cass, File No. C6-04-486 (Minn. Tax Ct. Feb. 2, 2005). Under those facts, the Court determined that failure to produce the lease was a violation of the 60 Day Rule.

Again, here the facts are dispositively different. Here, Irongate produced detailed income and expense statements rather than information in summary form. Moreover, Irongate produced rent rolls containing the specific information (names and number of tenants, location of rented space, size of rented space and specific rent paid) that was identified by the Court as missing from the petitioner's 60 Day Rule submissions in Outboard Services.

In sum, if anything, the reasoning and rulings of 1100 Nicollet Mall and Outboard Services stand instead for the proposition that Irongate did comply with the 60 Day Rule as interpreted by the Minnesota Tax Court in those cases.

Not only are the 1100 Nicollet Mall and Outboard Services cases inapposite, the Minnesota Supreme Court has recently held that tax court litigants are not bound by prior Tax Court decisions as presidential guidance for 60-Day Rule compliance.

Although the tax court is described as a “court,” it is an administrative agency within the executive branch. See Wulff v. Tax Court of Appeals, 288 N.W.2d 221, 222-25 (Minn. 1979) (distinguishing the tax court from judicial courts and upholding the constitutionality of the tax court statute, as against claimed violation of separation of powers, on the grounds that the taxpayer has the opportunity to elect to proceed in district court and because the tax court decisions are subject to judicial review of right in this court). As such, its *decisions have little, if any, precedential effect*. See Sprint Spectrum LP v. Comm’r of Revenue, 676 N.W.2d 656, 661 (Minn. 2004) (characterizing decisions of the tax court as being “nonbinding when in conflict with decisions of this court”); In re Whitehead, 399 N.W.2d 226, 229 (Minn. App. 1987) (recognizing that if a tax court’s departure from a “previous practice” is sufficiently supported by “reason or explanation,” “an administrative agency is not bound to rigid adherence to precedent”).

Kmart Corporation v. County of Stearns, 710 N.W.2d 761, 769 (Minn. 2006). (Emphasis added.) Even if 1100 Nicollet Mall and Outboard Services were to be read, as the Tax Court now suggests, to impose an absolute requirement that the 60 Day Rule always requires production of leases, there is no precedential effect of prior Tax Court cases.

(ii) Irongate Has Abundantly Complied With the 60 Day Rule According to its Statutory Language as it Has Been Interpreted by the Minnesota Supreme Court.

The first Minnesota Supreme case to interpret the 60 Day Rule was BFW Co. v. County of Ramsey, 556 N.W.2d 702 (Minn. 1997). The issue in BFW was the proper interpretation of the unavailability exception to the 60 Day Rule. At no time did the Minnesota Supreme Court hold in BFW that the 60 Day Rule required the production of leases. See discussion on pp. 11-14, supra.

The second Minnesota Supreme Court 60 Day Rule case involving a shopping center was Mendota Mall Assoc. v. County of Dakota, 578 N.W.2d 350 (Minn. 1998). Again, the issue in the case was whether income and expense statements of a shopping center were “unavailable,” within the meaning of the statute, when only the taxpayer’s unaudited statements were available at the time 60 Day Rule compliance otherwise would have been due. In Mendota Mall, the Supreme Court affirmed its prior decision in BFW.

However, as in BFW, neither the County, the Tax Court, nor the Supreme Court in any manner intimated that the taxpayer, as owner and landlord of the shopping center, was required to furnish the actual leases of the shopping center in connection with the 60 Day Rule. In fact, neither taxpayer in Mendota Mall or BFW provided any lease information whatsoever in connection with the 60 Day Rule, a fact that did not appear to trouble the County, the Tax Court or the Supreme Court in any manner. Conversely, here, Irongate has produced not only full and detailed income and expense statements, but also detailed rent rolls including the income and expense information under the leases.

The next line of Minnesota Supreme Court decisions interpreting the 60 Day Rule involved a number of Kmart department stores. While these are not shopping centers, *per se*, they are income-producing retail properties, and therefore are illustrative for purposes of interpreting the application of the 60 Day Rule to the subject property.

In Kmart Corp. v. County of Becker, 639 N.W.2d 856 (Minn. 2002), Kmart Corp. v. County of Douglas, 639 N.W.2d 863 (Minn. 2002), and Kmart Corp. v. County of St. Louis, 639 N.W.2d 866 (Minn. 2002) (the “Kmart Trilogy”), Kmart was the tenant, as

opposed to the landlord, so it did not have any income information relating to the real estate itself, other than its own lease. Accordingly, in connection with the 60 Day Rule, Kmart provided a lease summary for each property, along with selected pages from the leases themselves. Id. Kmart did not provide a full copy of its leases, as the Respondent now claims is required by 60 Day Rule. Again, neither the Counties, the Tax Court, nor the Supreme Court in any manner intimated that Kmart was required to do so. Notably, the Respondent in this case, St. Louis County, was a party to one of the cases in the Kmart Trilogy, and nowhere did St. Louis County argue that Kmart should have provided the entire lease.

The Kmart leases in question provided that Kmart had to pay a percentage of its retail store sales as overage rent if its sales exceeded a certain amount. Because Kmart did not provide the assessor any information regarding its actual stores sales, the Counties argued they did not know whether the overage rent clauses had been triggered. The Counties in each case argued that because the leases included an overage rent clause, Kmart must produce information regarding its retail store sales, since that was an income figure under the 60 Day Rule.

The Minnesota Supreme Court agreed with the Counties, and held that where income-producing property is subject to a lease with an overage rent clause, the 60 Day Rule requires a petitioner to provide the actual amount of rent paid in the relevant time period, including both base rent and overage rent, or at least sufficient information (i.e. the actual level of retail sales to calculate the percentage rental formula) so that the aggregate amount of rent could be calculated. Here, Petitioner has produced not only the

actual amount of rent paid in the relevant time period, but also specified both base rent and overage rent for each tenant consistent with the Supreme Court's decision, and provided complete income and expense statements as well, thus fully complying with the statutory interpretation that this Court announced in the Kmart Trilogy.

III. THE MINNESOTA TAX COURT'S INTERPRETATION RENDERS THE 60 DAY RULE UNCONSTITUTIONALLY VAGUE.

Notwithstanding the Legislature's description in Minn. Stat. § 278.05, subd. 6(a) that "information, including income and expense figures, verified net rentable areas, and anticipated income and expenses. . ." must be produced, the Tax Court effectively expanded the statute by holding that the 60-Day Rule requires production of *any useful information*, and "*any and all information* available to a petitioner seeking to reduce the assessed value of its property." (RA-97) (Emphasis added). In so doing, the Tax Court rendered the statute unconstitutionally vague by creating an ambiguous and unachievable compliance standard, leaving taxpayers at the whim of county attorneys and assessors who, long after the compliance period has expired, may claim with impunity that additional information should have been produced.³

³ This Court has not previously discussed in any of its previous 60-Day Rule cases whether an interpretation of the 60 Day Rule that places no limits on the scope of the information required to be produced is unconstitutionally overbroad. While the taxpayer in Kmart Corp. v. County of Stearns, 710 N.W.2d 761 (Minn. 2006), raised a constitutional argument based upon the Tax Court's indication in that case that the scope of information falling within the 60 Day Rule was boundless, this Court took a narrower view, and affirmed the Tax Court, holding merely that tenant-paid real estate expenses are required to comply with the 60-Day Rule. Perhaps because of the narrow scope of its affirmance, this Court's Stearns County decision did not go on to address or resolve the constitutional challenge raised by the taxpayer.

“The doctrine of vagueness is embodied in the due process clauses of the Fifth and Fourteenth Amendments. Due process incorporates notions of fair notice or warning.” Geiger v. City of Eagan, 618 F.2d 26, 28 (8th Cir. 1980). In order to comply with due process, “statutes must be written in such a manner that persons of ordinary intelligence need not guess at their meaning or differ as to their application.” State v. Orsello, 554 N.W.2d 70, 76 (Minn. 1996). Orsello relied upon the seminal Supreme Court opinion of Connally v. General Construction Co., 269 U.S. 385, 391 (1926), in which the Court held:

[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

As the Supreme Court explained in Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972):

Vague laws offend several important values. . . . Vague laws may trap the innocent by not providing fair warning. . . . A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Here, the 60 Day Rule, as drafted by the Legislature, requires that “information, *including* income and expense figures, verified net rentable areas, and anticipated income and expenses. . .” be provided. Minn. Stat. § 278.05, subd. 6(a). (Emphasis added.) The 60 Day Rule is complied with if information is provided which includes income and expense figures, verified net rentable areas, and anticipated income and expenses. The Tax Court’s interpretation does not, however, limit the information required to be

produced to the specific categories listed in the statute, leaving the taxpaying public with no ascertainable guidance regarding what other types of information might need to be produced. When the Tax Court interprets the statute in such a manner that no objectively ascertainable standard for compliance exists, on its face, the 60 Day Rule is unconstitutionally vague.

A. In Prior Cases Involving Shopping Centers, the Minnesota Tax Court Interpreted the 60 Day Rule in a Defined and Consistent Manner.

The Tax Court’s interpretations of the 60-Day Rule prior to its decision discussed below, interpreted the 60 Day Rule’s three information categories in a manner that intended to create a defined, consistent, and objective standard for compliance. The Tax Court in earlier shopping center cases did not view the statute as requiring any and all information that any assessor might, after the fact, claim to be useful to the appraisal or relevant to the appraiser of an income-producing property. Instead it consistently interpreted the statute to require specific income and expense information for income-producing property – namely, the income and expenses of owning and operating the real estate. See e.g., Eden Prairie Mall, L.L.C. v. County of Hennepin, File No. TC-2706 (Minn. Tax. Ct. Dec. 16, 1999); The Equitable Life Assurance Co. v. County of Hennepin, File No. TC-26225 (Minn. Tax Ct. Dec. 16, 1999). Countless taxpayers, not just Irongate, relied on the Tax Court’s interpretation of the 60-Day Rule’s undefined statutory language to provide guidance to assist them in complying with the statute.

B. The Minnesota Tax Court's Expanding Interpretation of the 60 Day Rule Shifts the Focus to the Discovery Standard of Relevance, Creates an Impossible Burden and Renders the 60 Day Rule Unconstitutionally Vague.

The Tax Court acknowledged in its decision below that the law regarding the 60-Day Rule has evolved. The Tax Court has abandoned its interpretation of the statute as creating a defined, consistent, and objective standard for compliance. Instead, the Tax Court has blurred the interpretation of the enacted words of the statute by expansively construing the word "information" to mean any and all information available to a petitioner that any assessor might one day claim to be useful to an appraisal or relevant to the determination of the market value of an income-producing property.

The net effect of the Tax Court's ruling is to gauge compliance with the 60-Day Rule by a subjective and inherently unachievable standard, governed by whatever a county, its assessors or attorneys, might argue is useful or relevant after the 60-day period has expired. As the Tax Court acknowledged in Kmart Corporation v. County of Stearns, File No. CX-00-404, *et al.* (Minn. Tax Ct. Order, March 3, 2005), given such a wide and all-encompassing interpretation of the Rule, "a petitioner would be well-advised to produce all information rather than withhold when unsure about meeting the 60-Day Rule requirements." *Id.* Thus, not only does the Tax Court's ruling set a subjective, not objective, standard for compliance, the scope of what must be produced is, simply, everything. A requirement that everything related to the ownership, operation and leasing of a shopping center must be provided is meaningless, and unachievable and therefore hopelessly vague and ambiguous.

In fact, this requirement has already caused significant confusion among taxpayers to the point that they are seeking guidance from County Attorneys. As is evident in the June 22, 2006 letter from Robert Rudy, Assistant Hennepin County Attorney, a “number of taxpayers” had contacted his office after the Kmart/Stearns County decision for such guidance. Notably, in June of 2006, even the Hennepin County Attorney’s Office did not believe that leases must be produced in connection with the 60 Day Rule. (RA-142-143.)

Ultimately, taxpayers have no way to know what information creative county assessors and attorneys may seek in the future, claiming that it is useful or affects market value. Taxpayers have statutory and constitutional rights to appeal their assessment for property tax purposes under Minn. Stat. Chapter 278. These statutory and constitutional rights should not be negated by requiring taxpayers to somehow read the minds of their adversaries in litigation and to predict the future in order to comply with the 60 Day Rule. Likewise, the 60 Day Rule should not be interpreted as a requirement that, in order to pursue a Chapter 278 petition for income-producing property, a taxpayer must within the 60 Day Rule compliance period turn over every document in its possession, even if redundant of information responsive to the description in the 60 Day Rule already provided. To do so would ignore the descriptive categories included in the information required to be turned over as established by the Legislature, and would render the statute so vague and ambiguous that its application would become wholly arbitrary and capricious, leaving taxpayers to guess at what they must do in order to comply.

IV. THE TAX COURT ERRED WHEN IT APPLIED THE 60 DAY RULE, BECAUSE THE REAL ISSUE BEFORE THE COURT WAS A SIMPLE DISCOVERY DISPUTE.

The Tax Court spent a considerable amount of time analyzing cases relating to discovery, primarily Corporate Property Investors v. County of Ramsey, File Nos. C3-03-7861 *et al.* (Minn. Tax Ct. April 23, 1996). The Tax Court determined that Irongate improperly refused to produce leases in discovery and ultimately concluded that Irongate's offer to tender the leases for review and copying at Irongate's headquarters in New York in response to discovery was not only a discovery violation (even though no motion to compel was ever brought), but it also somehow violated the requirements of the 60 Day Rule. In so concluding, the Tax Court misconstrued the real issue in dispute.

Irongate never argued that its offer to make the leases available for review at its headquarters in New York was sufficient for purposes of the 60 Day Rule. The fact that St. Louis County served discovery to obtain copies of the leases, in addition to the income and expense statements and rent rolls already provided by Irongate, instead of immediately filing a 60 Day Rule motion, tacitly constitutes an admission by St. Louis County that discovery was the proper avenue to gather any additional documents or information not previously furnished by Irongate. Therefore, Irongate argued that because St. Louis County did not even serve its discovery requests until several months after the deadline for 60 Day Rule compliance, Irongate's tender of the leases available for review at its headquarters in New York in response to discovery was wholly irrelevant, since Irongate had already satisfied the requirements of the 60 Day Rule.

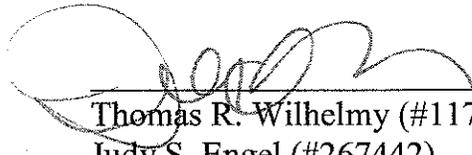
Regardless, it was the parties' discovery dispute regarding whether Irongate must physically deliver copies of the leases to St. Louis County, or whether Irongate could require St. Louis County to review the leases where maintained in the ordinary course of business (consistent with Tax Court discovery rulings), that prompted St. Louis County to file its motion seeking to dismiss Irongate's petition under the 60 Day Rule. Thus, Irongate argued that St. Louis County's motion should have been treated as a motion to compel discovery, not a motion to dismiss under the 60 Day Rule. Dismissal of a case is not an appropriate sanction for failure to adequately respond to discovery. Minn. R. Civ. P. 37.01. It is not until a court orders discovery upon motion, and that order is then ignored, that dismissal may be appropriate. Minn. R. Civ. P. 37.02. Here, the Tax Court never ordered Irongate to produce the leases in question. Accordingly, Irongate argued the Tax Court should have ruled that St. Louis County was asking it to improperly apply the draconian penalty of dismissal associated with the 60 Day Rule in a matter involving a simple discovery dispute. The Tax Court's failure to do so, and to acknowledge that St. Louis County's motion itself was improper, was reversible error.

CONCLUSION

For the reasons detailed herein, Irongate respectfully requests that this Court rule that Irongate complied with the 60 Day Rule, that the 60 Day Rule does not require the production of leases, where the income and expense information contained in the leases has been timely provided under the 60 Day Rule, that the Minnesota Tax Court's endlessly expansive interpretation of the 60 Day Rule has rendered it unconstitutionally vague, and that Irongate's petition should be reinstated.

Respectfully submitted,

Dated: November 21, 2006

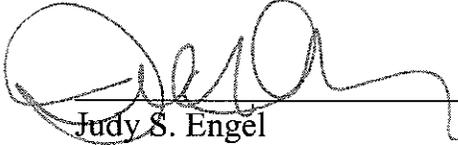


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**CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that Relator's Brief submitted herein contains 8,774 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Office Word 2000, the word processing system used to prepare this Brief.



Judy S. Engel